**Gold Coast Restaurant Corp., d/b/a Bryant & Cooper Steakhouse *and* Hotel Employees & Restaurant Employees Union, Local 100 of New York, New York, and Vicinity, AFL–CIO *and* Stephen Englehardt *and* Galo Ramirez *and* Jerome Foote.** Cases 29–CA–13290, 29–CA–13737, 29–RC–6927, 29–CA–13317, 29–CA–13368, 29–CA–13352, and 29–CA–13412

August 27, 1991

## DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On January 2, 1991,[1] Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed cross-exceptions and a brief in support.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Decision and Order.

### A. *The Discharges of Foote, Guidice, and Gippetti*

The judge found that the Respondent unlawfully discharged employees Jerome Foote, Vincent Guidice, and Andrew Gippetti in violation of Section 8(a)(3). We do not agree.

The Respondent is a restaurant owned and operated by the Poll family. The Poll family purchased the restaurant, then called Manero's, in September 1985 and operated it under that name. Foote, Guidice, and Gippetti were employed as waiters at the restaurant for many years when it operated under the name of Manero's, and before it was purchased by the Polls. The Union had represented the employees at Manero's for more than 20 years. In March 1986, a decertification petition was filed and an election was held wherein the Union was decertified. In April 1987 through early July 1987, the Polls closed the restaurant for renovations. When the restaurant reopened in mid-July 1987,[4] it began operating under the name of Bryant & Cooper Steakhouse. The Respondent hired back most, if not all, of its former waiters when it reopened.

When the restaurant reopened as Bryant & Cooper, it had a more elegant atmosphere and a more expensive menu. In addition, the waiters dressed in jackets and ties, rather than cowboy shirts and aprons as they had at Manero's. The service was more formal, as well. For example, the drinks were to be served on a tray, not held in the waiter's hand. Coffee was also to be served on a tray, and the coffee cups were not to be stacked on top of each other. Ashtrays were to be changed before serving, and other niceties not associated with the service previously provided at Manero's were required.

Foote, Guidice, and Gippetti were longtime members of the Union. Foote had been the shop steward at the time the Respondent took over the Manero's operation. Sometime in August 1987, Foote contacted the Union and spoke to Representative James Ward about organizing the restaurant employees. On about November 5, Ward gave Foote a supply of union authorization cards.

Foote gave most of the cards to waiters Stephen Englehardt and Galo Ramirez for distribution among the waiters, bartenders, and kitchen help. Foote, Englehardt, and Ramirez each signed a card and, at the restaurant during working hours, distributed the other cards to unit employees. The solicitations took place within a week after Foote picked up the cards. The cards were distributed and collected all on the same day. Employees generally made an effort to conceal the cards, and entered the men's room to sign them. After the cards were signed, they were given to Foote, who turned them over to the Union. Waiters Guidice and Gippetti were two employees who signed cards and spoke to other employees about the Union. In all, approximately 18 signed cards were obtained, in a unit of about 30 employees. There is no evidence that anyone in management observed or overheard such solicitations.

On Sunday, November 15, Owner Gillis Poll called Foote aside and told him he was not working up to par and he was being let go. Shortly thereafter, Poll called Guidice aside and said, ''Remember the conversation we had about a year and a half ago, well, I can't use you anymore.'' This was a reference to a conversation between Poll and Guidice a year and a half before in which Poll told Guidice that he was working too slowly.

[1] The judge inadvertently dated his decision January 2, 1990.

[2] We adopt the judge's finding that employee Stephen Englehardt was discriminated against in violation of Sec. 8(a)(3) and (1) of the Act because of his union activities. We find it unnecessary to pass, however, on the judge's conclusion that the discriminatory actions (Englehardt's suspension for 2 days on January 9, 1988, his loss of earnings due to the Respondent's conduct in December 1987 and January 1988, and his constructive discharge in January 1988) also violated Sec. 8(a)(4). In so finding, we note that the remedy for a violation of Sec. 8(a)(4) would be essentially the same as the remedy for the violations of Sec. 8(a)(3) and (1) found here.

[3] In the remedy section of his decision, the judge recommended that the Respondent expunge from its records any reference to the unlawful actions taken against its employees, to provide written notice of such expunction to those employees, and to inform them that the Respondent's unlawful conduct will not be used as a basis for further personnel action against them. This expungement requirement was inadvertently omitted from the Order, and we shall include it.

[4] All dates are in 1987 unless otherwise noted.

The next day, November 16, Manager Abby Pignatore called Gippetti aside and told him he was being terminated. When Gippetti asked why, Pignatore told him that he could not handle the job anymore, and that ''You know better than I do. But I have to lay you off. . . . I have to do my job and tell you that you have to leave.''

The judge found that these discharges were unlawfully motivated. He found that the Respondent's knowledge of the employees' union activities could be implied from the circumstances surrounding the discharges, the size and type of operation the Respondent is engaged in, and the manner in which the employees' union activities were conducted. The judge further found that knowledge could also be inferred from the Board's ''small plant'' doctrine.[5] Based on these factors, the judge concluded that the General Counsel had established a prima facie case of discriminatory discharge under *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). We disagree.

We find that the General Counsel has failed to establish that the Respondent had knowledge of the employees' union activities at the time of their discharges, and has therefore failed to establish a prima facie case. The Board has long held that, in the absence of direct evidence, an employer's knowledge of union activity may be inferred. Here, however, we find the evidence insufficient to support an inference that the Respondent had knowledge of the employees' union activities.

The factors noted by the judge, such as the suspicious timing of a discharge, a departure from past practice, an employer's previous tolerance of the behavior for which an employee is allegedly fired, and the fact that there is no specific incident precipitating a discharge, may, in some circumstances, support an inference that the reason given for a discharge was pretextual. In the present case, we find that there are several countervailing factors that prevent us from inferring knowledge and a finding of pretext.

Although the timing of the discharges is suspicious, coming within a week of the employees having signed authorization cards, we note that this factor is tempered somewhat by the fact that of the three employees discharged, only Foote had a leadership role in the union organizing campaign. The other leaders in the union campaign, Englehardt and Ramirez, were not fired along with Foote. Guidice and Gippetti did not engage in any conduct that would distinguish them from many other card signers. Guidice and Gippetti signed authorization cards on the same day as the rest of the employees. Although they were longtime union members and discussed the Union freely at work, other employees who were not fired were also union members and also discussed the Union at work. Guidice and Gippetti testified that they did not help in the union campaign and did not solicit other employees to sign cards. Thus, if Respondent was motivated by union considerations, there is no explanation why the Respondent would have included Guidice and Gippetti in its discharges. In these circumstances, the fact that three employees, only one of whom was a leader in the union campaign, were fired within a week of signing authorization cards is insufficient to support an inference of employer knowledge or pretext.[6]

We further find that the evidence does not establish that the Respondent departed from a past practice of not firing employees or that the Respondent tolerated the conduct for which the employees were fired until the union organizing campaign began. Although the Respondent owned the restaurant for over 2 years, it had been operating under the name of ''Bryant & Cooper Steakhouse'' for only about 4 months. In light of the fact that the type of service expected from the waiters at Bryant & Cooper was quite different from that expected when the restaurant operated as Manero's, it is not necessarily a departure from past practice for the Respondent to have taken action to ensure the quality of service at its new operation. Further, the lapses in service for which the employees were fired were not tolerated by the Respondent. On the contrary, the judge himself found that the alleged discriminatees were each the recipients of criticism during the daily meetings held by the Respondent for the purpose of giving employees feedback and comments on the service they were providing.

With respect to the judge's reliance on the small plant doctrine to support an inference that the Respondent had knowledge of the union campaign, we again find that in the circumstances here, this inference is not warranted. The judge relied on the facts that the Respondent's work force is small, that the restaurant is small, with wide-open spaces, and that the Polls and the restaurant manager frequently walk through the restaurant. The judge also found that the only activity the employees sought to conceal was the actual signing of the cards.

Contrary to the judge, we find that any inference that would be raised pursuant to the small plant doctrine as to the Respondent's knowledge is negated by our finding that the employees made an effort to conceal virtually all their organizing efforts from management. Foote testified that union discussions were avoided if someone from management was present. Foote, Guidice, and Gippetti each testified that they never observed anyone from management present

[5] See *Wiese Plow Welding Co*., 123 NLRB 616 (1959).

[6] Member Cracraft agrees that the timing alone is an insufficient basis in this case for finding the discharges of Foote, Guidice, and Gipetti to be violative of the Act. However in reaching this conclusion, she does not rely on the argument in this paragraph.

when they were discussing the Union. When the authorization cards were handed out, they were all handed out and collected on the same day, specifically so that management would not find out about the cards. Further, the employees signed the cards in the men's room, so they would not be observed by management. Where such an effort is made to conceal the employees' organizing effort, the small plant doctrine cannot by itself support the inference that the Respondent knew of the union activities of Foote, Guidice, and Gippetti at the time of their discharges.[7] Accordingly, we reverse the judge's finding that these discharges violated Section 8(a)(3) of the Act and dismiss those portions of the complaint.

### B. *The Discharge of Schalen*

The judge found that employee Rense Schalen was not discharged for engaging in protected concerted activity and that therefore his discharge did not violate the Act. We disagree.

Schalen began working with the Respondent as a waiter on July 6, 1988, after the restaurant had already reopened as Bryant & Cooper Steakhouse. On Saturday, September 10, 1988,[8] Schalen and a group of seven other waiters were scheduled to work a catered party from which the waiters expected a gratuity of $106 per waiter. After working the party, the gratuity they received from the Respondent was $70. All the waiters discussed the difference between the gratuity that they received and the one expected, and they decided to speak with Gillis Poll on the evening of September 10.

That evening, Rense Schalen was called to the house telephone in the bar area to answer a call from his girlfriend. During this conversation, he told his girlfriend that he was very upset that he had only received $70 for the job and that he was ''going to the Labor Board and the Union'' to complain. Dean and Gillis Poll were in the bar area, about 12 feet away from Schalen when he had this conversation, but they were situated so that Schalen did not see them.

Shortly after his phone conversation, the manager of the restaurant came up and told Schalen that the Polls wanted to see him. Schalen went back to the bar area and met with Dean and Gillis Poll. Gillis Poll said that he had heard that Schalen was unhappy about his gratuity. Schalen replied that ''We are very unhappy about it.'' Poll then asked Schalen, ''Are you the spokesman for everybody?'' Schalen replied that he was not. The Polls and Schalen then discussed the gratuity issue as it concerned Schalen. During this discussion, the parties grew angry. Finally, Schalen told the Polls that if he had known he was going to get such a small gratuity, he would not have worked the party. Dean Poll then told Schalen to ''get the hell out of here.'' Schalen left that evening.

The judge noted that in *Meyers Industries I*[9] and *Meyers Industries II*[10] the Board held that to engage in concerted activity, an employee must act with authority of other employees and the employer must know of the concerted nature of such activity. The judge found that Schalen's telephone conversation, which was likely overheard by the Polls, involved only a discussion of his individual dissatisfaction with the gratuity given. The judge also found that, in his conversation with Gillis Poll, Schalen denied being the spokesman for the group. Based on this, the judge concluded that Schalen was acting on his own behalf, and that the Respondent had no reason to believe that Schalen was acting in concert with the other waiters. Accordingly, the judge found that because neither condition of the *Meyers* test was met, Schalen's discharge did not violate the Act.

Contrary to the judge, we find that Schalen was discharged for engaging in protected, concerted activity, and that the Respondent knew that his activity was concerted. Gillis Poll did not deny that he overheard the telephone conversation between Schalen and his girlfriend, in which Schalen stated that he was ''going to the Labor Board and the Union'' to complain about the amount of the gratuity he received. A statement of this nature is, of itself, protected, concerted activity.[11] *B & P Trucking*, 279 NLRB 693, 698 (1986); *Charles H. McCauley Associates, Inc*., 248 NLRB 346, 350 (1980), enfd. in relevant part 657 F.2d 658 (5th Cir. 1981). Further, Schalen's complaint was clearly a group complaint. Schalen told the Respondent as much when he answered the Respondent's question as to whether he was upset about the gratuity received by saying, ''We are very unhappy about it.''

The judge concluded that, because of Schalen's negative answer to Poll's next question about whether Schalen was the spokesman for everyone, and the fact that during the rest of the conversation only Schalen's concerns about the gratuity were discussed, the Respondent could not have had knowledge that Schalen's actions were concerted. We find, however, that the Respondent was clearly aware, prior to speaking to Schalen, that Schalen was engaged in protected activity. Schalen's denial of spokesman status did not negate his statement to Poll that the complaint was shared by all the waiters, and certainly does not in any way detract from Schalen's statement that he was going to take his complaint to the ''Labor Board and

[7] *Millcraft Furniture Co*., 282 NLRB 593, 607 (1987); *K & B Mounting, Inc*., 248 NLRB 570, 571 (1980); *Mantac Corp*., 231 NLRB 858 fn. 2 (1977); *Ontario Gasoline & Car Wash*, 228 NLRB 950, 952 (1977).

[8] The judge stated the date of this incident as September 16. The parties stipulated at the hearing, however, that the relevant date was September 10.

[9] 268 NLRB 493 (1984).

[10] 281 NLRB 882 (1986).

[11] Despite Schalen's threat to go to the Labor Board, no violation of Sec. 8(a)(4) was alleged in the complaint.

the Union.'' Thus, the Respondent remained on notice that Schalen was engaged in protected, concerted activity.[12]

We recognize that Schalen spoke to Poll by himself before the meeting at which all the employees were planning to confront the Polls over the gratuity. However, this was because Poll requested to speak with Schalen after having overheard Schalen's phone conversation in which he mentioned going to the Labor Board and the Union. Having been put on notice that Schalen was engaged in concerted activity, the Respondent acted to circumvent this activity by immediately thereafter engaging Schalen in a private conversation and firing him.

Accordingly, we find that Schalen's discharge violated Section 8(a)(1) as alleged.

### C. *The Challenged Ballots and Election Objections*

An election was held on December 12, 1987, at the Respondent's facility. The vote was 16 for, and 18 against, the Union, with 5 challenged ballots. The Union filed objections to the election. In his Report on Objections and Challenges issued January 21, 1988, the Regional Director overruled Objections 1 and 2, and recommended consolidating Objections 3, 4, and 5 with the complaint and notice of hearing in the present unfair labor practice case. The Regional Director also recommended that the challenge to the ballot of Jane Incao be overruled and her ballot opened and counted, that the challenge to the ballot of Harold Sturim be sustained, and that the hearing on the challenges to the ballots of Foote, Guidice, and Gippetti be consolidated with the instant unfair labor practice proceeding.[13]

Based on his findings that Foote, Guidice, and Gippetti were unlawfully discharged, the judge concluded that the ballots of these three individuals should also be opened and counted and a revised tally of ballots issued. The judge further concluded that if as a result of the revised tally of ballots the Union does not receive a majority of the votes cast, the election should be set aside and a new election conducted because of the objectionable conduct alleged in Objections 3 and 5.

Objection 3 alleges that on or about November 22, 1987, the Employer changed the schedules of several employees who were known union supporters in order to deter other employees from supporting the Union. Objection 4 alleges that Foote, Guidice, and Gippetti were discharged due to their union sympathies in order to deter other employees from supporting the Union. Objection 5 alleges that by letter dated December 4, 1987, Dean J. Poll, president of the Respondent, threatened the employees that if the Union won the election, the restaurant would close.

Having found that the conduct alleged in Objections 3 and 4 were unfair labor practices, the judge found that the conduct alleged in Objection 3 constitutes grounds for setting aside the election held December 12, 1987. The judge also found that the letter alleged in Objection 5 to be objectionable constituted a threat that if the Union won the election, ''closing is inevitable.'' He concluded that this threat violated Section 8(a)(1) of the Act. He also concluded that this letter constitutes grounds for setting aside the election, as alleged in Objection 5.

We agree with the judge, for the reasons he stated, that the conduct alleged in Objections 3 and 5 constitute grounds for setting aside the election, and that the letter described in Objection 5 violated Section 8(a)(1), as alleged.[14] As stated above, we disagree with the judge's conclusion that Foote, Guidice, and Gippetti were unlawfully discharged, and we therefore overrule his conclusion that the challenges to the ballots of these three individuals should be opened and counted. Accordingly, the single remaining challenged ballot is no longer determinative, and therefore it is unnecessary for a revised tally of ballots to issue.

## ORDER

The National Labor Relations Board orders that the Respondent, Gold Coast Restaurant Corp., d/b/a Bryant & Cooper Steakhouse, Roslyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their membership in, or activities on behalf of, Hotel Employees & Restaurant Employees Union, Local 100 of New York, New York, and Vicinity, AFL–CIO or any other labor organization.

[12] After Schalen was fired, the rest of the waiters approached management and complained about the gratuity received. Those waiters were then paid the higher amount to which Schalen told the Polls he felt he was entitled. Before Schalen left the Respondent's premises that night, he approached Dean Poll and said, ''You see Dean? I'm not the only one . . . that's complaining about this.'' Poll answered, ''We have nothing to say, so get out.'' Certainly, these discussions affirmed what the Respondent already knew from overhearing Schalen's telephone conversation and from Schalen's initial response to its questions, that is, that Schalen was engaged in concerted activity in protesting the amount of the gratuity he received for working that day.

[13] The Employer excepted to the consolidation of Objection 4 with the unfair labor practice complaint because the conduct alleged in Objection 4 occurred prior to the filing of the petition, and also excepted to the Regional Director's recommendation to sutain the challenge to the ballot of Harold Sturim. The Regional Director then issued an amended report recommending that Objection 4 be overruled because it alleged pre-petition conduct. The Union excepted to this amended report. In an unpublished decision dated March 24, 1989, the Board adopted the Regional Director's recommendation to sustain the challenge to Sturim's ballot and held that, although the election could not be set aside based on the pre-petition conduct alleged in Objection 4, that conduct may be considered to add dimension and meaning to the conduct alleged in Objection 3.

[14] Because we do not find that Foote, Guidice, and Gippetti were unlawfully discharged, we did not consider the pre-petition discharges of these individuals in determining that Objection 3 constitutes grounds for setting aside the election.

(b) Creating the impression of surveillance of its employees' activities on behalf of the Union or any other labor organization.

(c) Changing the work schedules of its employees because of their activities on behalf of the Union or any other labor organization.

(d) Instituting a formal written warning system because its employees engaged in activities on behalf of the Union or any other labor organization.

(e) Issuing written warnings to its employees pursuant to the written warning system described above because its employees engaged in activities on behalf of the Union or any other labor organization.

(f) Suspending its employees because of their activities on behalf of the Union or any other labor organization.

(g) Discharging its employees because of their protected, concerted activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Stephen Englehardt and Rense Schalen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its files any reference to the unlawful discharges, unlawful suspensions, and unlawful written warnings, and notify the employees in writing that this has been done and that the Respondent's unlawful actions will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Roslyn, New York, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election conducted on December 12, 1987, in Case 29–RC–6927 is set aside and this case is severed and remanded to the Regional Director for Region 29 for the purpose of scheduling and conducting a second election at such time as he deems the circumstances permit a free choice on the issue of representation.

[Direction of Second Election omitted from publication.]

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their membership in, or activities on behalf of, Hotel Employees & Restaurant Employees Union, Local 100 of New York, New York, and Vicinity, AFL–CIO or any other labor organization.

WE WILL NOT create the impression of surveillance of our employees' activities on behalf of the Union or any other labor organization.

WE WILL NOT change the work schedules of our employees because of their activities on behalf of the Union or any other labor organization.

WE WILL NOT institute a formal written warning system because our employees engaged in activities on behalf of the Union or any other labor organization.

WE WILL NOT issue written warnings to our employees pursuant to the written warning system described above because our employees engaged in activities on behalf of the Union or any other labor organization.

WE WILL NOT suspend our employees because of their activities on behalf of the Union or any other labor organization.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

WE WILL NOT discharge our employees because of their protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Stephen Englehardt and Rense Schalen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net earnings, plus interest.

WE WILL notify our employees that we have removed from our files any reference to the unlawful discharges, unlawful suspensions, and unlawful written warnings against them, and WE WILL notify those employees in writing that this has been done and that the Respondent's unlawful actions will not be used against them in any way.

GOLD COAST RESTAURANT CORP., D/B/A BRYANT & COOPER STEAKHOUSE

*April M. Wexler, Esq.*, for the General Counsel.
*Martin Gringer, Esq.*, and *Alegia Kantor, Esq. (Kaufman, Frank, Naness, Schneider & Rosensweig, P.C.)*, for the Respondent.
*Barry J. Peek, Esq. (Meyer, Suozzi, English & Klein, P.C.)*, for the Union.

## DECISION

### STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on November 13–16, 1989, in Brooklyn, New York. On November 18, 1987, Hotel Employees & Restaurant Employees Union, Local 100 of New York, New York and Vicinity, AFL–CIO (Local 100 or the Union) filed a petition for certification of representatives for all full-time and regular part-time dining room, bar and kitchen employees, employed by Gold Coast Restaurant Corp., d/b/a Bryant & Cooper Steakhouse (Respondent or the Employer) in Case 29–RC–6927. On December 1, 1987, the Regional Director for Region 29 approved a Stipulated Election Agreement for an election in the above-mentioned unit. The election was held on December 12, 1987. The challenged ballots were sufficient in number to affect the results of the election. Thereafter, on December 18, 1987, the Union filed timely objections to conduct affecting the results of the election. Three of the Union's objections were sent to hearing and consolidated with the unfair labor practice charges.

On November 18, 1987, the Union filed an 8(a)(1) and (3) charge against Respondent, in Case 29–CA–13290.

On December 16, 1987, Stephen Engelhardt (Engelhardt), filed an 8(a)(1) and (3) charge against Respondent, in Case 29–CA–13317.

On December 31, 1987, Engelhardt filed a first amended charge in Case 29–CA–13317.

On January 13, 1988, Galo Ramirez (Ramirez) filed an 8(a)(1) and (3) charge against Respondent in Case 29–CA–13352.

On January 26, 1988, Engelhardt filed an 8(a)(1), (3), and (4) charge against Respondent in Case 29–CA–13368.

On February 29, 1988, Jerome Foote (Foote) filed an 8(a)(1) and (3) charge against Respondent in Case 29–CA–13412.

On October 13, 1988, the Union filed an 8(a)(1) charge against Respondent in Case 29–CA–13737.

On August 15, 1989, the Regional Director for Region 29 issued an order further consolidating cases, consolidated amended complaint and notice of hearing in Cases 29–CA–13290, 29–CA–11317, 29–CA–13352, 29– CA–13368, 29–CA–13412, 29–CA–13737, and 29–RC–6927 (the consolidated amended complaint) alleging that Respondent violated Section 8(a)(1), (3), and (4) of the Act.

Briefs were filed by counsel for the General Counsel, counsel for the Union, and counsel for Respondent. On my consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following

### FINDINGS OF FACT

Respondent is a New York corporation with its principal office and place of business located at Two Middleneck Road, Roslyn, New York, where it is engaged in the operation of a public restaurant, selling food and beverages. Annually, Respondent in the course and conduct of its business operations derives gross revenues in excess of $50,000 and purchases and receives food supplies and other products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York. Jurisdiction is admitted by Respondent.

It is also admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent operates a family owned restaurant in Roslyn, New York. For many years before the restaurant became Bryant & Cooper, it was called Manero's Steakhouse. The Union represented the employees at Manero's for more than 20 years. The Polls, the family who owns Bryant & Cooper (Respondent) purchased Manero's in around September 1985 and operated it under that name. In March 1986 a decertification petition was filed at Manero's and an election was held wherein the Union was decertified. In April through early July 1987, the restaurant closed for renovations. When it reopened in mid-July 1987, it began operating under the name of Bryant & Cooper Steakhouse. When Respondent opened, after renovations, it hired most, if not all of the waiters formerly employed by Manero's.

When the restaurant reopened in July 1987, it employed approximately 35 employees. Gillis Poll, one of the owners, is generally at the restaurant every day except Sunday. Respondent was a different type restaurant from Manero's. Respondent had a more elegant atmosphere and a more expensive menu.

In addition, the waiters were to be dressed in jacket and tie, rather than a cowboy shirt and apron they had worn at Manero's. The service was to be formal type service, rather than the casual and informal service employed at Manero's. In this respect, the drinks were to be served with a tray rather than being hand held. Coffee was to be served on a tray

and the coffee cups not stacked on top of one another. Ash trays were to be changed before serving, and many other niceties were required, not associated with the service at Manero's. To insure that such service was maintained, Respondent held daily meetings with the waiters to explain what type of service was expected and to discuss any problems with the service generally, or with specific waiters, individually.

Jerome Foote, Vincent Guidice, and Andrew Gippetti were professional waiters with long years of service at Manero's. They were long-time members of the Union; Foote having been the shop steward at the time Respondent took over the Manero operation.

Sometime in August 1987, Foote contacted the Union and spoke to representative James Ward about the possibility of organizing the restaurant. Sometime in early November, Ward gave Foote a supply of union authorization cards to be distributed among the employees with the intention of filing for a petition for election. Foote gave most of these cards to Stephen Engelhardt, and a few to Galo Ramirez, waiters, for distribution among the waiters, bartenders, and kitchen help. The three employees signed cards and distributed the others to the unit employees. The cards were distributed, and their purpose explained in Respondent's restaurant during working hours. There is no direct evidence that Respondent officials observed or overheard such solicitations. The cards were distributed on or about November 9 but were dated November 5 because Engelhardt had taken them home on November 5, filled in the name and address of Respondent and the date on each card to minimize the time the waiters would need to fill in their card. After the cards had been distributed and signed by the unit employees they were returned to Foote who turned them over to the Union. Approximately 18 signed cards were obtained. Between November 5 and 15, Foote, Engelhardt, and Ramirez spoke with most of the unit employees trying to convince them to join the Union. Guidice and Gippetti also signed cards and spoke to other employees in an attempt to convince them to join the Union. All of these conversations took place in Respondent's restaurant. There is no direct evidence that Respondent observed or overheard these conversations.

On November 15, a Sunday, Gillis Polls' usual day off, he called Foote aside and told him that his work was not up to par and he was letting him go. Shortly afterward Poll called Guidice aside and told him ''Remember the conversation we had about a year and half ago, well I can't use you any more.'' This was a reference to a conversation between Poll and Guidice a year and a half ago when Poll told Guidice he was working too slow. On November 16, Manager Abby Pignatore, an admitted supervisor within the meaning of the Act, called Gippetti aside and told him he was being terminated. When Gippetti asked why, Pignatore told him ''You know better than I do, but I have to lay you off. I was told that I have to do my job and tell you that you have to leave.''[1]

Gillis Poll credibly testified that from the beginning of Respondent's operation, following the renovation, he conducted daily meetings with the waiters to discuss the daily operation and problems which might occur. Often he would criticize a particular waiter for stacking the coffee cups or serving the drinks by hand, rather than on a tray or other complaints. Many of these complaints were the result of habits picked up by the waiters during their long years of service at Manero's. Most of Respondent's waiters had been employed by Manero's for a long period of time. Foote, Guidice, and Gippetti were among the waiters who received such criticisms.[2] However, no waiter was ever threatened with a discharge, nor were any written warnings issued, nor were any waiters disciplined or suspended. In fact, prior to the discharges on November 15 and 16 described above, only one employee was ever fired by Respondent. Poll testified that on November 15 he simply concluded that because of his constant complaints with Foote, Guidice, and Gippetti concerning their manner of service he could no longer continue their employ.

In order to prove that a discharge was discriminatorily motivated, it is necessary to prove that the employer had knowledge of the discharged employees' union activity. *Bayliner Marine Corp*., 215 NLRB 12 (1974). Although, in this case there is no direct knowledge of the discharged employees' union activities, I conclude such knowledge can be implied from the circumstances surrounding the discharges, the size and type of operation of Respondent's restaurant and the manner in which the employees' union activities were conducted.

With respect to the circumstances surrounding the discharge, the evidence established that the discharges took place within a week of the employees solicitation of cards, and just 2 days prior to the date the Union filed its representation petition, when Respondent admitted it first had knowledge of the Union's organization campaign. Thus the timing of the discharge is highly suspicious. Moreover, the discharge of employees was contradictory to Respondent's past practice. The evidence established that from the time Respondent first took over the Manero operation until the discharges in issue, Respondent had only discharged a single employee. Further, the employees discharged had engaged in the conduct for which they were allegedly discharged since Respondent took over the Manero operation in 1985 without ever receiving a written warning. Nor had Respondent ever orally warned them that they would be discharged if such conduct continued. The evidence clearly establishes that the employees' conduct was condoned by Respondent until they engaged in union activity. Further, still, there was no precipitating conduct which might otherwise justify a discharge. This establishes the pretextual nature of the discharges. In *Yaohan of California*, 280 NLRB 268, 269 (1986), the Board concluded under facts similar to the instant case that knowledge of union activity could be implied solely from the circumstances surrounding the discharge. *A to Z Portion Meats*, 238 NLRB 643 (1978).

Knowledge of the employees' union activity can also be implied from the Board's small plant doctrine. The small plant doctrine may be applied where the facility is small and open, the work force is small, the employees made no great

[1] Pignatore was not called by Respondent as a witness to refute Gippetti's testimony.

[2] Foote, Guidice, and Gippetti denied that they had ever been criticized by Poll. I do not credit such testimony. In view of the long period of service of Respondent's waiters at Manero's, it is logical to assume that they all developed certain habits encouraged by the casual service than permitted. It is reasonable to assume such habits would be hard to break and constant criticism was necessary, more for some waiters than for others.

effort to conceal their union conversations, and management personnel are located in the immediate vicinity of the protected activity. *Health Care Logistics*, 784 F.2d 232 (6th Cir. 1986). The facts of this case establish the applicability of the small plant doctrine. The work force is small, approximately 30 employees. The restaurant is very small, with wide open work areas. Respondent's owners, the Poll family, and its manager are constantly walking throughout the entire restaurant facility. The employees' activities took place in Respondent's restaurant, during working hours and in the open. The only activity that the employees attempted to conceal was the signing of union cards. However, even this activity was done in Respondent's facility and during working hours. The Board has held that even where an employee has taken care to conceal his organizing activity from Respondent, such concealment does not necessarily eliminate applicability of the small plant doctrine, especially where as in the instant case, the facts surrounding the discharge are so clearly pretextual. *A to Z Portion Meats*, supra. Under all these circumstances, I conclude that the small plant doctrine is applicable and further conclude that Respondent had knowledge of the employees' activity prior to the discharges. In determining whether Respondent discriminatorily discharged the above-named employees, General Counsel has the burden of proving that the employees' Union activities were a motivating factor in such alleged discrimination. Once such motivating factor is established, the burden of the proof shifts to the employer to establish that the same action would have taken place in the absence of the employees' union activity. *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1080 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). This rationale is like balancing weights on a scale. The greater the weight of evidence in General Counsel's prima facie case, the greater weight of evidence Respondent must place on the scale to shift the balance. In the instant case, the General Counsel has presented a very strong prima facie case while Respondent's defense, rather than shifting the balance, adds to General Counsel's case.

In the instant case, as discussed above, General Counsel has established the suspicious timing of the discharges, that the discharges were made contrary to Respondent's practice of not discharging employees, that the actions complained of by Respondent had taken place and were condoned by Respondent since it took over the Manero operation, and that there was no precipitating incident which directly caused the discharges. Respondent's defense that the employees were discharged because of incompetence is clearly pretextual in view of its past practices described above. Thus Respondent really presents no defense. Accordingly, I conclude that Respondent discharged Foote, Guidice, and Gippetti in violation of Section 8(a)(1) and (3) of the Act.

In late December 1987 and January 1988, Respondent offered Guidice and Gippetti reinstatement and they accepted such offer and were reinstated to their former positions. On January 9, Respondent offered and Foote accepted reinstatement to his former waiter's position. General Counsel contends that upon Foote's reinstatement in January, Respondent thereafter changed Foote's working conditions by increasing the number of days he worked from five to six, changing his work stations, assigning him less customers, all of which substantially reduced Foote's earnings and caused him to quit.

Foote was the only witness to testify concerning this issue. His testimony in this area was at times vague, and at other times inconsistent. Foote testified on direct examination that upon return to work he was assigned to work 6 days rather than the usual 5 days he worked before his discharge. However, on cross-examination Foote admitted that upon his return all waiters were assigned to work 6 days. He then testified that the high end of his usual earnings were $400 per week and that he often made over $300 per week in tips. However, Foote's pay stubs establish that at no time prior to his discharge did he earn $300 in tips much less $400. In fact Foote's pay stubs establish that following his reinstatement his income derived from tips was essentially the same as before his discharge and this is true, notwithstanding, that the period following his reinstatement, a postholiday period, is a slow period in the restaurant business. Foote also testified that upon his return to work, Respondent assigned him to undesirable work stations. For example at one point in his testimony he complained he was assigned to many tables for two (duces) which were less desirable than tables for four. Yet at another point in his testimony he testified that duces were good tables because they turn over fast. Still at another point in his testimony he testified that the type of station was not the issue, rather it was the type of customer that was assigned to his tables. According to his testimony, some kinds of customers looked like good tippers while others did not and his real complaint was that Respondent assigned him customers which did not look good. I find such testimony not only contradictory, but meaningless. An excellent example of Foote's vague testimony was when the General Counsel asked him why he left Respondent in February and he replied:

> Well the reason I left was the way he put my, the switching of the tables. He was switching me with—he was more or less saying the kid (a new waiter) was a better kid than I was. He could do the job better, and there was a lot of other stuff too, over the last six or seven months. All the stuff that he was throwing in on me. I don't know how many months it was, but it was quite a while. He was [referring to Respondent's manager Pignatore] a real wise guy. You'd complain to him and he'd make faces at you, like he was giving you a big grin, he wasn't doing nothing.

The evidence established that Guidice and Gippetti reinstated with Foote have worked at Respondent continuously to date with no complaint.

The Board has held that to establish a constructive discharge it is necessary to prove that the burdens or changed working conditions imposed on an employee must be so difficult or unpleasant so as to force him to resign, and that such burdens or changed working conditions were imposed because of the employees' union activities. *Crystal Princeton Refining Co*., 222 NLRB 1068, 1069 (1976). The above facts, in my opinion, fail to establish a prima facie case supporting a constructive discharge. In this connection the facts establish that upon Foot's reinstatement, he was assigned to work the same hours as all other waiters, that he received similar wages and tips following his reinstatement as prior to

his discharge. There is insufficient evidence to establish that he was assigned less customers, or undesirable tables. Moreover, there is no allegation that Guidice or Gippetti, waiters who were discriminatorily discharged with him and who engaged in more or less the same union activity, were in any discriminatorily treated following their reinstatement. Accordingly, I conclude that the General Counsel has failed to establish that Foote was constructively discharged as alleged in the complaint.

Engelhardt and Ramirez began working for Respondent when Respondent reopened its restaurant after remodeling. Both waiters were excellent waiters. They were articulate, relatively young and good looking, and based on their demeanor it is easy to see why they were admittedly the most successful waiters in Respondent's complement. They worked together as a successful team for months prior to the advent of the Union, and were Respondent's most successful team. Respondent's waiters generally worked in teams. Both Engelhardt and Ramirez were active participants in the Union's organizational campaign, Engelhardt in particular. Both employees spoke to other employees, encouraging them to join the union and solicited employees to sign union cards.

Before the petition was filed, both Ramirez and Engelhardt were always scheduled to work each Friday and Saturday nights, the busiest nights of the week. In addition, Engelhardt was off work on Monday, the slowest night in the week, but worked Wednesday lunch and dinner. Engelhardt requested and received Monday off because his wife who worked elsewhere had Mondays off and they wanted to spend the day together. Respondent was advised of this by Engelhardt.

On November 22, a few days after the Union's petition was filed, Respondent failed to schedule Engelhardt and Ramirez for the Friday and Saturday night dinners, and changed Engelhardt's day off from Monday to Wednesday. When they complained, Respondent rescheduled them for the weekend and rescheduled Engelhardt for Mondays off. Although neither of them missed the weekend work, Engelhardt lost his Monday off that week.

The Union election was held on December 12. Engelhardt acted as the Union's observer. On December 14, Respondent split up Engelhardt and Ramirez as a team and rescheduled Engelhardt's day off from Monday to Wednesday.

General Counsel contends the rescheduling of the employees' weekend work and Engelhardt's day off was discriminatorily motivated, notwithstanding, that the work was rescheduled without loss of work. Engelhardt did lose his day off. General Counsel further contends that the splitting up of Engelhardt and Ramirez as a team following the election in which Engelhardt acted as the Union's observer and again rescheduling his day off was also discriminatorily motivated.

The evidence throughout this case establishes a pattern of Respondent discrimination. Following Respondent's knowledge of the Union's campaign it discharged Foote, Guidice, and Gippetti. This pattern continued when Respondent, immediately following receipt of the Union's petition, and without any explanation, changed the work schedules of Engelhardt and Ramirez eliminating their lucrative weekend work. Respondent advanced no reason for such action other than to state it was a mistake. There is no evidence that such mistake had ever taken place in the past. Respondent also changed Engelhardt's day off from Monday to Wednesday without any reason, although Poll was aware that Engelhardt took Mondays off to be able to spend time with his wife who also had Monday off at her place of employment. There is no evidence that Respondent had taken similar scheduling action prior to the union campaign. As set forth above, Engelhardt and Ramirez were the most active union adherents. I conclude that Respondent had knowledge of their union activities based on the lack of any explanation for such action. *Yaohan of California, A to Z Portion*, supra, and the small plant doctrine *Health Care Logistics, A to Z Portion Meats*, supra. Respondent's animus is established by the actions themselves, taken without any reason, and Respondent's discriminatory discharges, described above. In view of Respondent's knowledge of the employees' activities, its animus, the timing of such action and the failure to offer a credible reason for such action, I conclude such action was discriminatorily motivated and violative of Section 8(a)(1) and (3). That Respondent's action was thereafter rescinded does not diminish the discriminatory nature of such action in view of Respondent's prior discriminatory conduct, described above and below. The same reasoning applies to Respondent's splitting up of Engelhardt and Ramirez as a team and again rescheduling Engelhard's day off. This time such action took place the day following the union election where Engelhardt acted as the Union's observer. Accordingly, I find such action similarly violative of Section 8(a)(1) and (3).

It is admitted that prior to the filing of the union petition for election Respondent had no formal warning system, either oral or written. Following the receipt of the petition, on the advice of its attorney, Respondent instituted a written warning system. Following the institution of such warning system, and following Engelhardt's acting as the Union observer during the election held on December 12, Respondent issued four separate written warnings to Engelhardt on December 17, 19, and two warnings on December 29.

There is no question but that Respondent's written warning system was instituted directly as the result of the Union's petition. This is admitted. The Board had held that in *Joe's Plastics*, 287 NLRB 210 (1987), that:

> The use of a warning system as part of a disciplinary procedure is permissible when the procedure is not implemented in response to protected Union activities of employees. When the warning system is issued to discourage Union activity, it is impermissible.

See also *Economy Foods*, 294 NLRB 660 (1989), and *Electri-Flex Co.*, 228 NLRB 847, 848 (1977). Thus as it is clear that the written warning system was instituted in direct response to the Union's campaign, I conclude it was intended to discourage union activity and violates Section 8(a)(1) and (3) of the Act.

Consistent with my conclusion that Respondent's written warning system was violative of Section 8(a)(1) and (3) of the Act it follows that Respondent's warnings issued to Engelhardt were also violative of Section 8(a)(1) and (3). However, on the merits of the warnings themselves, I would conclude that they were discriminatorily motivated. As set forth above these were the only warnings issued by Respondent. They were issued to Engelhardt, the most active union adherent. Their issuance followed his acting as the Union's observer. The warnings related to matters which were pre-

viously condoned by Respondent or were otherwise not prohibited.

Respondent's December 17 warning to Engelhardt encompassed several latenesses, failing to tip the bartenders, and recommending that other waiters not tip the bartenders. The credible corroborative testimony of Engelhardt, Ramirez, Foote, Guidice, and Gippetti establish that the waiters were often late but did not receive warnings for such lateness. The evidence also established that, although, it was customary for the waiters to tip the bartenders with a small percentage of their tips, there was no mandatory rule or requirement by Respondent that they do so. In the instant case Engelhardt refused to tip the bartenders because he believed they did not vote for the Union. Several other waiters also refused to tip the bartenders for the same reason, yet they received no warning.

The December 19 warning resulted from a statement that Engelhardt made to Respondent's bookkeeper who acted as Respondent's observer. On passing Roberts, the bookkeeper, Engelhardt stated to her that he would spit in the food of a friend of hers who was eating in the restaurant that evening. Engelhardt testified that the remark was a sarcastic remark and was not taken seriously by Roberts. Roberts was not called to testify. There was no evidence that Engelhard took any action in this regard. Several days later Gillis Poll asked Engelhardt if he made such statement. Engelhardt admitted making such statement, but denied meaning it. Nevertheless, Respondent issued a warning.

It is clear to me that no one believed Engelhard was serious concerning his sarcastic statement to Roberts. Under the circumstances of this case described above and below, I conclude the warning which issued was discriminatorily motivated.

On December 29, Engelhardt received what was called a warning, although reading it, it is difficult to tell. The warning states as follows:

> The following appears in your personnel file. On Thursday, December 24, Steve Engelhardt telephoned in the morning to report that he cannot come to work as he allegedly hurt his back. On Saturday, December 26, Gillis Poll asked Steve, ''How is your back, is it better?'' Steve replied, ''Why do you want it to be?''

On its face the warning appears to imply that he is being warned because Respondent suspected that his excuse for not coming to work was false. However, there was no reason for Respondent to doubt Engelhardt's claim, and in fact no evidence was adduced that Engelhardt was faking injury. In view of Respondent's entire course of conduct concerning the union campaign, and particularly with respect to Engelhardt, it is clear that Respondent's reason for issuing the warning was discriminatorily motivated.

On December 29, Engelhardt received a second warning that he was declaring tips well below the actual tips received. There is no evidence to establish that such practice violated any of Respondent's rules. Moreover, the credible testimony established that it was the general practice in the industry for waiters to under declare tips. In any event most, if not all of Respondent's waiters under declared their tips and never received warnings concerning this practice. The evidence relating to this warning clearly establishes that Respondent was singling out Engelhardt, because of his union activity. I conclude that the institution of Respondent's written warning system as well as each warning issued to Engelhardt was discriminatorily motivated and violative of Section 8(a)(1) and (3) of the Act.

On December 29, following the issuance by Respondent of two written warnings, Engelhardt was suspended for 5 days. The suspension resulted when Gillis Poll observed Engelhardt smoking in the back of the restaurant, an area apart from the customer area. Engelhardt credibly testified that on this particular night, he was working as part of a three-man team. Almost all teams were two-man teams. It was the end of the evening and the waiters on his team were serving the last of the customers. In Engelhardt's case, his customers were eating their dessert and it only remained for the waiters to hand the tables their checks. Engelhardt told the waiters on his team that he would tally up the charges for the night while they finished off the tables. He then proceeded to the back area of the restaurant and began working on the tally. While engaged in such work he began to smoke a cigarette. Several other waiters and some kitchen help were seated with Engelhardt. Some of these employees were smoking. Poll came by, saw Engelhardt smoking, and asked him what he was doing. Engelhardt told Poll he was doing the charges. Poll asked him if he had any tables and Engelhardt told him that the other waiters were outside and that all they had to do was drop off the checks. Poll said nothing and left. At the end of the day as Engelhardt was leaving, Poll told him to take the next 5 days off. This suspension covered the lucrative New Year's night. The evidence is not really clear as to the actual reason for the suspension. However at the trial of this case Respondent contended that it was for smoking in violation of Respondent's no-smoking rule. Thus, Respondent does not contend that Engelhardt's presence in the back area of the restaurant was a factor in the suspension. The credible testimony of Engelhardt, Ramirez, Foote, Guidice, and Gippetti establish that, although, Respondent had a rule against smoking in the back area and spoke to waiters about it from time-to-time, such practice was generally condoned. In any event, no employee had ever been disciplined for smoking. Applying the *Wright Line* principles to this suspension, General Counsel established a strong prima facie case. First, there are the discriminatory discharges described above. Secondly, there is the discriminatory conduct directed to Engelhardt and Ramirez described above. Third, there is the discriminatory pattern of warnings administered to Engelhardt, the Union's most prominent organizer, the last of which occurred on December 29, the date of the suspension. Thus, the timing of the suspension is very suspicious to say the least. Respondent's defense that Engelhardt was suspended for violating Respondent's no-smoking rule appears pretextual in view of Respondent's prior condonation of such activity. Moreover, at the time of the suspension, no reason was given to Engelhardt by Respondent as to why he was being suspended. Accordingly, I conclude that this suspension was discriminatorily motivated and in violation of Section 8(a)(1) and (3) of the Act.

On January 9, 1988, Engelhardt and Ramirez were working on different teams. At one point in the evening, Engelhardt was working a table and asked Ramirez if he could serve a bottle of wine at another table that he had taken an order from. The wine was ready at the bar to be

served. Ramirez who was free at the moment, agreed and went to get the bottle to serve. While Ramirez was serving the bottle of wine, Engelhardt noticed one of Ramirez' tables ready to order. Rather than delay the order, Engelhardt took the order from Ramirez' table. Gillis Poll observed this, came over to Engelhardt and Ramirez and according to their credible corroborative testimony Poll asked them what they were doing. Ramirez told Poll that they were helping each other out. Poll asked Ramirez to follow him. They went to the kitchen. Engelhardt followed. According to the corroborative and credible testimony of Engelhardt and Ramirez, Poll began yelling at Ramirez. He called him a ''cocky bastard'' and told him ''If you don't like it, why don't you quit.'' When Ramirez did not respond, Poll told Ramirez he was being suspended for 5 days. Although he did not set forth the reason for the suspension explicitly, he implied that it was because he believed that they were operating together as a team, notwithstanding his discriminatory separation of them as a team about a month ago. A short time later, Poll told Engelhardt that he would not be suspended because, if he did so, Engelhardt would probably file additional charges with the Board and tell more lies. Nevertheless, later that evening he told Engelhardt he was suspended for 2 days. He did not state any reason.

Respondent has a policy set forth in its employee handbook which encourages waiters to help each other to facilitate customer service. Respondent concedes such practice is always encouraged. This practice transcends team assignments. It would appear that the action taken by Engelhardt and Ramirez was exactly that type of activity encouraged by Respondent. There is no evidence that other than this single incident, which was in accordance with Respondent's practice, Ramirez or Engelhardt attempted that evening, to circumvent Respondent's team assignments and work together as a team. For the same reasons, I concluded that the December 29 suspension of Engelhardt was discriminatorily motivated, I conclude the January 9 suspensions of Engelhardt and Ramirez were similarly discriminatorily motivated. I additionally point out that Ramirez was an extremely active Union activist and Respondent was aware of such activity. Additionally, it is significant that other than the single incident described above, there was no evidence that Engelhardt and Ramirez helped each other out that evening or any other evening. Moreover, and also significantly, Ramirez and Engelhardt were merely complying with Respondent's practice set forth in its employee handbook.

During the trial of this case, Engelhardt testified that at the beginning of the evening on January 9, he and his team partner agreed to pool their tips with Ramirez and his partner. This was done in order to equalize any sharp tip differential that might occur if one team received many customers and the other received a few. This pool arrangement did not contemplate a switch of teams, rather merely a pooling of tips. There is no evidence that such practice was prohibited by Respondent. Respondent, in its brief, argues that Ramirez and Engelhardt were suspended because of such pooling. However, there is no evidence that Respondent was aware of this arrangement at the time of the suspensions. Moreover, the other two waiters who agreed to pool their tips were not disciplined. Such inconsistent reason for the suspensions further diminishes Respondent's defense and is further evidence of a discriminatory motivation. *Superior Warehouse Grocers*, 277 NLRB 18, 21 (1985).

Additionally, and significantly, Polls' statement to Engelhardt that he was not going to suspend him because he might file additional charges with the NLRB is still further evidence that the suspensions were discriminatorily motivated.

Accordingly, I conclude the suspensions of Engelhardt and Ramirez were discriminatorily motivated and in violation of Section 8(a)(1) and (3) of the Act. Moreover, in view of Poll's statement about Engelhardt's filing charges with the NLRB, I also conclude that his suspension violated Section 8(a)(4) of the Act.

Engelhardt credibly testified that beginning in late December his earnings began to decrease significantly from about $500 to $600 per week to about $300 per week. Engelhardt's diary confirms such testimony. According to the credible testimony of Engelhardt, the December period is a peak earning period. Although Engelhardt concedes that the January period is slow, he credibly testifies that this would not account for such drastic reduction in his earnings. He credibly testified that such reduction in earnings was the result of Respondent's failing to seat customers, including many of Engelhardt's regular customers at his table. Engelhardt was admittedly an excellent waiter, quick, articulate, good looking, efficient, and very personable. He had a large group of regular customers who would request his service. Yet beginning in December, these customers were not seated at his table. Although, Respondent's records show that on certain nights during this period, Engelhardt had as many customers as other waiters, I find based on Engelhardt's credible testimony corroborated by his diary entries which show his weekly earnings, that he was earning considerably less than what he should have normally earned during this period.

On January 5, shortly after Engelhardt filed additional charges with the NLRB against Respondent, Gillis Poll told Engelhardt during working hours that that he was a ''f—ing bastard'' and that he was costing Respondent more money than he was worth. This was probably a reference to the cost of attorney fees Respondent was paying to defend these charges. I conclude that based on this statement which constitutes a threat of discharge, a similar statement by Poll to Engelhardt on January 9, just prior to his suspension, and the pattern of discriminatory conduct directed against Engelhardt, described above, that Respondent was intentionally failing to seat customers at Engelhardt's table because of his Union activities and because he filed unfair labor practice charges with the Board against Respondent. Engelhardt credibly testified that because of Respondent's conduct, particularly that conduct which resulted in a significant reduction in his earnings, he quit Respondent's employ. Applying the *Crystal Princeton Refining Co*., supra, to the facts of the instant case, I conclude that the General Counsel has established a constructive discharge. Accordingly, I conclude that Engelhardt was constructively discharged by Respondent, in violation of Section 8(a)(1), (3) and (4) of the Act. *Scotch & Sirloin*, 269 NLRB 436 (1984). Ramirez credibly testified that shortly before the election, James Poll called him to his office, and in the presence of Gillis and Dean Poll, asked him who was behind the Union. I conclude such a question is clear interrogation, in violation of Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984).

Sometime shortly after the election which was held on December 12, James Poll sat down next to Ramirez and said, ''You got all my people from the kitchen.'' I conclude such statement was intended to create the impression that Poll knew how the kitchen employees voted, and that such statement creates the impression of surveillance, in violation of Section 8(a)(1) of the Act.

The facts surrounding the discharge of Rense Schalen are not related to the facts surrounding the Union's organizing campaign described above. The charge in Case 29–CA–13737 filed by the Union involves an alleged discharge of Schalen because he engaged in protected concerted activity. The complaint in this case was amended to include the instant complaint because it involved the same charging party Union and the same Respondent. Thus a single trial would resolve all complaints.

Schalen began his employment with Respondent as a waiter on July 6, 1988. During the week of September 16, Schalen and a group of seven other waiters were scheduled to work a catered party from which the waiters expected a gratuity of $106 per waiter. After working the party, the gratuity they received from Respondent was $70. All the waiters discussed the difference in the gratuity received from that expected and decided to speak with Gillis Poll on the evening of September 16. No particular waiter was selected as a spokesman for the group. There is no evidence that Respondent was aware of this discussion. On the evening of September 16, Schalen was talking on the telephone in the bar area to his girlfriend. During this conversation he told his girlfriend that *he* was very upset that *he* had only received $70 for the job and that *he* was going to the Board to complain. Dean and Gillis Poll were in the bar area, about 12 feet away from Schalen when he had this telephone conversation. Right after this telephone conversation, Tom __, the manager came over to Schalen and told him that Gillis Poll wanted to see him. Schalen went back to the bar area and met with Gillis Poll. Poll told him that he heard that Schalen was unhappy with his gratuity. Schalen told him ''We are very unhappy about it.'' Poll than asked Schalen, ''Are you the Spokesman for everybody?'' Schalen replied, ''No.'' Poll and Schalen then discussed the gratuity issue as it concerned Schalen. During this discussion it appears both parties grew angry. Finally, Schalen told Poll that if *he* knew *he* was going to get such a small gratuity, he wouldn't have worked the party. Poll than told Schalen to ''get the hell out of here.'' Schalen left that evening.

Assuming that Poll overheard Schalen's telephone conversation with his girlfriend, which is very likely, in view of his subsequent discussion with Schalen, almost immediately afterward, Schalen was only complaining about his own failure to receive a larger gratuity. During the discussion with Poll Schalen stated that ''We'' meaning all the waiters were unhappy with the gratuity. Poll then specifically tried to pin Schalen down, probably because of the inconsistency between his telephone conversation where he expressed *his* dissatisfaction with the gratuity, and his subsequent expression of ''We'' during his conversation with Poll. Accordingly, he specifically asked him if he was the spokesperson for the other waiters and Schalen explicitly as possible said ''No.'' At this point in time, Poll had no reason to believe that Schalen, was acting in concert with the other waiters. Moreover, in the conversation that followed which led to Schalen's discharge, Schalen apparently discussed *his* dissatisfaction with Respondent's failure to pay *him* the expected gratuity. It was because of Schalen's continued dissatisfaction with the size of *his* gratuity that led directly to his discharge. In *Meyers Industries I*, 268 NLRB 493 (1984), and *Meyers Industries, II*, 281 NLRB 882 (1986), the Board held that to engage in ''concerted'' activity, an employee must act with authority of other employees and the employer must know about the concerted nature of such activity. The facts of the instant case establish that neither condition was met. Accordingly, I conclude that Respondent by discharging Schalen, did not violate the Act, as alleged.

As set forth above, certain challenges and objections in Case 29–RC–6927 were consolidated with the complaints for resolution by me. The challenges for determination were the challenged ballots of Foote, Guidice, and Gippetti. These voters were challenged by the Board because their names were not on the *Excelsior* list because they were discharged. In view of my finding that such discharges were discriminatory, I conclude that the challenges to their ballots be overruled and their votes be opened and counted.

The objections for determination are:

> (3) That on or about November 22, 1987, the employer changed the schedules of several employees eligible to vote in the election who were known to the employer to be sympathetic to the union, for the purpose of deterring other employees from supporting the union in the election.
>
> (4) The discharge of Jerome Foote, Vincent Guidice and Andrew Gippetti, all of whom were known by the employer and other employees to be sympathetic to the union, was due to their activities and support of Local 100, the purpose and effect of which was to deter other employees from supporting Local 100 in the election.
>
> (5) That by letter dated December 4, 1987, Dean J. Poll, President of the employer, threatened the employees that if Local 100 won the election, the restaurant would be closed.

On January 21, 1988, Regional Director Alvin Blyer issued a report on objections and challenges to the election. The Regional Director made the following findings.

Although the objectionable conduct complained of in Objection 4 was pre-petition conduct, the Board in a decision dated March 24, 1989, held that such conduct may lend meaning and dimension to the post petition conduct alleged in Objection 3. In my resolution of the unfair labor practice case both Objections 3 and 4 were alleged as unfair labor practices. As set forth above, I have concluded that the alleged objectionable conduct in Objection 3 was unfair labor practice. In reaching this conclusion, I considered the discriminatory discharges of Foote, Guidice and Gippetti as evidence. Accordingly, I conclude that the objectionable conduct described above in Objection 3 constitutes grounds for setting aside the election held pursuant to the above petition. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962).

With respect to the objectionable conduct alleged in Objection 5, Respondent's December 4 letter to all employees, which is the basis for the objection is set forth as follows:

> Last year, the employees of Manero's Steak House voted in an election that they did not want to have

> Local 100, Hotel and Restaurant Employees' Union represent them. These employees decided they did not want to pay dues to a union to talk for them. (Union dues are now as high as $20 per month). They decided they could deal directly with management and do as well or better. They decided they did not want to risk strikes where they would lose pay and even lose their jobs if they were permanently replaced.
>
> Since the last election, things have changed a lot. We are now Bryant & Cooper Steakhouse. We have borrowed money to rebuild and decorate so that this will be the kind of place to which customers will want to come and return. We have upgraded the menu and tried to improve service. It appears that our plans are working. Hopefully, we will be able to repay our loans and start making a profit in the future.
>
> The situation should be encouraging to everyone. However, a few employees apparently want to bring the union back. In our opinion, this is taking a step backward. We firmly believe that a union is not necessary nor desirable here. The restaurant business is a gamble. We have hit upon a formula that will get us to the top and keep us there. This would be good for everyone. A successful business is the only job security in the restaurant business. I can tell you about hundreds of restaurants in New York which were unionized that have gone out of business. The union was unable to do anything to save the jobs of the employees in these restaurants. In our opinion, the union may have even contributed to some of these closings. Service tends to get lazy and tired at these places. When people come to these places, they don't have a good time they don't come back. When that happens, a closing is inevitable.
>
> We don't want that to happen here. You have an opportunity to prevent it.
>
> The National Labor Relations Board has scheduled another election for Saturday, December 12, 1987, from 4:00 P.M. to 5:00 P.M. At this election, you will have the opportunity to vote NO for NO UNION, NO STRIKES, and NO DUES. It is important that every employee vote. Don't let others make this decision for you. This will be a secret ballot election. No one will know how you vote. Even if you signed a card for the union, you have a right to change your mind and vote NO.
>
> If you have any questions about this letter or the Union, our doors are open for you to discuss them, with us. The letter was signed by Dean Poll, Respondent's President.

In determining whether such letter is objectionable the Board held in *NLRB v Gissel Packing Co*., 395 U.S. 575 (1969), that when discussing possible consequences of unionization by the employer, ''[t]he prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.'' *Gissel Packing Co*., id. at 618. The Court went on to state that if the employer implies that action may be taken ''unrelated to economic necessities,'' then the statement is no longer protected by the First Amendment but a threat of retaliation based on misrepresentation and coercion.

Bringing this perspective to bear on the present case, it is Local 100's contention that Respondent's letter went beyond the limit of protections afforded an employer's speech in the delicate atmosphere attendant on the eve of representation election. The statement in the letter discussing ''hundreds of restaurants in New York which were unionized that have gone out of business'' is clearly intended to suggest such dire results will be the case with their restaurant. The statement is certainly not a ''carefully phrased'' statement of ''demonstrably probable consequences'' beyond the employer's control. The letter suggests that ''the union may have even contributed'' to the closings without supplying the underlying facts upon which such an assertion purports to be based. This in the context of a union seeking certification which had been the collective- bargaining representative of the employees of the Respondent's corporate predecessor for 20 years.

The employer's letter continues that ''[s]ervice tends to get lazy and tired at these places,'' people who dine ''don't have a good time and they don't come back.'' This statement is nothing more than an example of extreme union animus, and clearly unsupportable given the union's history at this restaurant. The clear threat comes in the next line, when the employer suggests that ''closing is inevitable,'' when ''that happens.'' The statements convey to the reader that the unionization of the restaurant will mean deterioration of service and an inevitable closing, and therefore loss of jobs for the employees.

The statement as a whole is similar to one found violative of Section 8(a)(1) in *Scott Glass Products*, 261 NLRB 906 (1982).

Accordingly, I conclude the letter set forth above in Objection 5 constitutes grounds for setting aside the above election.

It is my ultimate conclusion with respect to the objections and challenges before me that the ballots of Foote, Guidice, and Gippetti be opened and counted and if as a result of such revised tally of ballots the Union does not receive a majority of the valid votes counted that such election be set aside and a new election be conducted.

## CONCLUSIONS OF LAW

1. Respondent is and has been at all times an employer engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating its employees concerning their membership in, or activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.
4. By creating the impression of surveillance of its employees' activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.
5. By changing the work schedules of Galo Ramirez and Stephen Engelhardt, because of their activities on behalf of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.
6. By instituting a formal written warning system because its employees engaged in activities on behalf of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.
7. By issuing written warnings to its employees pursuant to the written warning system described above in paragraph 6, and because its employees engaged in activities on behalf

of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

8. By suspending its employees Engelhardt and Ramirez because of their activities on behalf of the Union and because Engelhardt had filed charges with the National Labor Relations Board, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

9. By discharging employees Jerome Foote, Vincent Guidice, and Andrew Gippetti because of their activities on behalf of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

10. By constructively discharging its employee Engelhardt because of his activities on behalf of the Union and because he filed charges with the Board, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

## THE REMEDY

Having found that Respondent has engaged in various unfair labor practices within the meaning of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action to effectuate the policies of the Act.

Since I have found that Respondent discriminatorily discharged its employees Engelhardt, Foote, Guidice, and Gippetti, I shall recommend Respondent make whole the employees together with interest as set forth below, from the date of their termination until their reinstatement or valid offer of reinstatement.

Since I have also found that Respondent discriminatorily suspended its employees Engelhardt and Ramirez, I shall recommend Respondent make whole paid employees together with interest as set forth below, for the period of their suspensions.

Backpay for the above employees shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950). Interest on and after January 1, 1987, shall be computed at the ''short-term'' Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621 in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed as set forth in *Florida Steel Corp*., 231 NLRB 651 (1977).

I shall also recommend that Respondent expunge from its records any written warnings directed to Engelhardt from its records and any reference to the suspensions of Engelhardt and Ramirez, and the discharges of Engelhardt, Foote, Guidice, and Gippetti, and to provide written notice of such expunction to those employees, and to inform them that Respondent's unlawful conduct will not be used as a basis for further personnel action concerning them. *Sterling Sugars*, 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]